(2)

No. 89-862

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

UNITED STATES DEPARTMENT OF JUSTICE,
Respondent.

SYBIL YOUNG and RODERICK YOUNG,
Petitioners,

vs.

CHEMICAL BANK, N.A.,
Respondent.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Counter-Statement Of Issues

I. WHETHER THE RIGHT TO FINANCIAL PRIVACY ACT APPLIES TO FEDERAL LAW-ENFORCEMENT OFFICIALS, WHO HAVE BEEN DESIGNATED AS COMMISSIONERS BY THE DISTRICT COURT PURSUANT TO ASSISTANCE TO FOREIGN TRIBUNALS AND LITIGANTS ACT, WHO ACTING AS MERE "CONDUITS" OBTAIN INFORMATION FROM THE BANK WITH A COURT-ORDERED SUBPOENA, AND WHO DO NOT CONDUCT ANY FEDERAL INVESTIGATION, AND, IF THE PRIVACY ACT APPLIES, MAY THE BANK BE FOUND LIABLE FOR VIOLATING THE PRIVACY ACT WHEN IT OBEYS SUCH COURT ORDER.

The District Court answered this question in the negative, and the Second Circuit Court of Appeals affirmed.

II. WHETHER RODERICK YOUNG LACKS STANDING TO ASSERT A CAUSE OF ACTION ARISING FROM THE PRIVACY ACT AS HE WAS NEITHER A CUSTOMER NOR REPRESENTATIVE AUTHORIZED BY THE BANK.

The District Court answered this question in the affirmative, and the Court of Appeals affirmed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

List of Subsidiaries of Respondent

The following lists the wholly-owned subsidiaries of Chemical Banking Corporation ("CBC"), which are affiliates of Chemical Bank as of December 18, 1989. The subsidiaries of the first-tier CBC subsidiaries are indented. This list excludes certain non-publicly held subsidiaries and affiliates of CBC subsidiaries, of Chemical Bank, Texas Commerce Bancshares, Inc., Chemical New Jersey Holdings, Inc. that hold real or personal property acquired in satisfaction of debts. The excluded subsidiaries have been afforded confidentiality by federal regulatory agencies (such as the Federal Reserve Bank) and the New York State Department of Banking.

Bach Holding Corporation
Brown & Company Securities Corporation
CBC-USA, Inc.
Chatham Ventures, Inc.
Chemadvertising, Inc.
ChemSel, Inc.
Chemical Asset Management, Inc.
Chemical Bank
Chemical Bank & Trust Company of Florida, National Association
Chemical Bank, National Association
Chemical Business Credit Corp.
Chemical Equity Incorporated
  Chemical Venture Capital Corporation
Chemical First State Corporation
  Chemical Bank Delaware
    CBDC Corporation
    RBY, Inc.
  Chemical Connecticut Corporation
  Chemical Denver, Inc.
  Chemical (HVFLP) Inc.
Chemical Florida Banks, Inc.
Chemical Futures, Inc.
Chemical Futures Management, Inc.
Chemical International Securities Corp.
Chemical Investment Advisers, Inc.

Chemical Investment Group, Ltd., The
Chemical Investments, Inc.
Chemical Mortgage Company
Chemical Mortgage Securities, Inc.
Chemical New Jersey Corporation
Chemical New Jersey Holdings, Inc.
  Chemical Bank New Jersey, National Association
  Princeton Bank and Trust Company, National Association
  Chemical Trust Company of Florida, National Association
  Horizon Brokerage Services, Inc.
  Chemical Pennsylvania Corporation
Chemical New York, Inc.
Chemical New York - N.V.
Chemical Real Holdings, Inc.
Chemical Realty Corporation
  Side Corp.
Chemical Securities, Inc.
Chemical Technologies Corporation
  Pronto U.S.A., Inc.
  BankLink, Inc.
  Electronic Customer Services, Inc.
CT Holdings, Inc.
  Chemical Bank Texas, National Association
Investment and Capital Management Corp.
  Chemical Asset Management, Inc.
  Penmark Investments, Inc.
Offshore Equities
  The Andean Fund, Inc.
    Equifin
  Select Andean Holdings, Inc.
  Select Brazilian Holdings, Inc.
    Chempas Participacoes e Emprendementos Ltd.
  Select Life Holdings, Inc.
  Select Rio Grande Holdings, Inc.
  Select Southern Holdings, Inc.
  Sociedad Mexicana Para La Industria Y El Comercio S.A.
Portfolio Group, Inc., The
Pronto, Inc.
Quantum Investement Management, Inc.

Chemical Financial Services Corporation, Ltd.
- Chemical Card Services Corporation
- Chemical Financial Corporation (AZ)
- Chemical Financial Corporation (CA)
- Chemical Financial Corporation (FL)
- Chemical Financial Corporation (GA)
- Chemical Financial Corporation (IL)
- Chemical Financial Corporation (NC)
- Chemical Financial Corporation (PA)
- Chemical Financial Corporation (OK)
- Chemical Financial Corporation (TX)
- Chemical Financial Corporation (WA)
- Chemical Financial Services Corporation (CO)
- Chemical Financial Services Corporation (FL)
- Chemical Financial Services Corporation (GA)
- Chemical Financial Services Corporation (IN)
- Chemical Financial Services Corporation (KY)
- Chemical Financial Services Corporation (LA)
- Chemical Financial Services Corporation (NC)
- Chemical Financial Services Corporation (SC)
- Chemical Financial Services Corporation (TN)
- Chemical Financial Credit Services Corporation (KY)
- Chemical Financial Credit Services Corporation (TN)
- Sun States Life Insurance Company
- Great Lakes Insurance Company
- Lorry, Ltd.
- Chemical Student Services Corporation (CO)
- SFC Agency, Inc. (NY)
- Chemical Financial Investment Corporation
  - Chemical Financial Corporation (OH)
  - Chemical Financial Acceptance Corporation (OH)
  - Chemical Financial Services Corporation (OH)
  - Chemical Student Services Corporation (OH)
  - SFC Agency, Inc. (OH)

Texas Commerce Bancshares, Inc.
- Pyramid Agency, Inc.

Texas Commerce Information Systems, Inc.

Texas Commerce Bank Foundation, Inc.

Texas Commerce Funding Company

TexCom Venture Capital, Inc.
Texas Commerce Shareholders Company
  Gulf Building Corporation
Texas Commerce Services Company
Texas Commerce Bancshares Leasing Company
Texas Commerce Leasing Company
Texas Commerce Financial Services, Inc.
Texas Commerce Capital Markets, Inc.
  Texas Commerce Corporate Finance
  Texas Commerce Securities, Inc.
Texas Commerce Bank (Delaware)
Texas Commerce Mortgage Co.
Texas Commerce Investment Management Co.
Texas Commerce Bank - Amarillo
Texas Commerce Bank - Austin, N.A.
Texas Commerce Bank - Beaumont, N.A.
Texas Commerce Bank - Conroe, N.A.
Texas Commerce Bank - Corpus Christi
Texas Commerce Bank - Dallas, N.A.
Texas Commerce Bank - El Paso, N.A.
Texas Commerce Bank - Fort Worth
Texas Commerce Bank - Friendswood
Texas Commerce Bank - National Association, Lubbock
Texas Commerce Bank - McAllen, N.A.
Texas Commerce Bank - Midland, N.A.
The Stone Fort National Bank of Nacogdoches, Texas
Texas Commerce Bank - Odessa
Texas Commerce Bank - San Angelo, N.A.
Texas Commerce Bank - San Antonio
Texas Commerce Bank - Arlington
  Arlington State Corporation
  Texas Commerce Bank - Longview, N.A.
    5511 Incorporated
  Texas Commerce Bank - Rio Grande Valley
  Texas Commerce Bank - Sugar Land, N.A.
  Texas Commerce Trust Company of New York
  Texas Commerce Bank National Association, Houston
    TCB - Leasing Company
  Texas Commerce Commercial Leasing Company

Texas Commerce Equipment Leasing Company
Texas Commerce National Leasing Company
Texas Commerce International Leasing Company
Texas Commerce Investment Company
Watermill Ventures, Inc.

Chemical Bank ("CB") owns a fifty percent interest or more in the following subsidiaries. Subsidiaries of a CB subsidiary are indented.

Chemical Acceptance Corporation
Chemical Acceptance Corporation I
Chemical Mortgage Acceptance Corporation
Chemical Bank of Canada
Chemical Bank Canada Lease Inc.
Chemical Community Development, Inc.
Chemical International Finance, Ltd.
Chemco International, Inc.
Chemical Videotex Services, Inc.
Chemgraphics Systems, Inc.
ChemLease Worldwide, Inc.
ChemNetwork Processing Services, Inc.
Chem Credit, Inc.

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ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Counter Statement of the Case

Petitioners, Sybil Young and Roderick Young, petition for *certiorari* from an order of the Court of Appeals for the Second Circuit, which affirmed the order of the District Court of the Southern District of New York, which denied their cross-motion for partial summary judgment pursuant to the Federal Rules of Civil Procedure ("FRCP") Rule 56, and granted the motion of Chemical Bank sued herein as Chemical Bank, N.A. ("Chemical" or "respondent") to dismiss the complaint for failure to state a claim on which relief may be granted pursuant to FRCP Rule 12(b), and which, on fact affidavits, petitioners allege was converted to summary judgment pursuant to FRCP Rule 56. Petitioners alleged in their cross-motion for summary judgment that there were no material disputed issues of fact.

The Second Circuit Court of Appeals made the narrow holding that the Right to Financial Privacy Act (the "Privacy Act") does not apply to court-appointed commissioners who would otherwise qualify as "government authorities" under the Privacy Act, when they seek information from financial institutions with court-ordered subpoenas. No other Circuit Court or state court has ever held to the contrary.

Petitioners seek damages in excess of $10,000,000 from Chemical on the theory that Chemical's compliance with a Court-ordered subpoena requiring it to produce testimony and bank records requested by the government of Bermuda lead to petitioners' convictions for violations of Bermuda's currency laws.

The lower courts properly held on these undisputed facts that the complaint failed to state a Privacy Act claim against Chemical. The subpoena issued by District Judge Charles E. Stewart, Jr. pursuant to which Chemical provided documents to representatives of the Bermudian government was on its face regular and proper and compelled Chemical's compliance. Moreover, the subpoena was directed to assist a prosecution of petitioners' criminal activities in Bermuda. It did not request information to assist a United States government investigation. The United States Attorney acted only as a Commissioner for the transmittal of information to Bermuda and at no time ever used any financial information produced by Chemical for any federal investigation.

The Privacy Act only limits the United States government's access to financial information; it does not repeal or impinge on the Assistance to Foreign and International Tribunals and to Litigants before such Tribunals Act ("Assistance to Foreign Tribunals and Litigants Act"), 28 U.S.C. § 1782. It is this latter Act which expressly authorized the Bank's conduct here.

The second cause of action on behalf of petitioner, Roderick Young ("Roderick"), also fails to aver a claim on which relief may be granted pursuant to the Privacy Act, because he neither

had an account with Chemical nor was he an authorized representative permitted to transact business with the Bank. Thus, since he is not a customer of this financial institution he lacks standing under the Privacy Act.

The complaint is premised on petitioners' claim that in committing scores of currency violations involving hundreds of thousands of dollars, petitioners had the right not to have Chemical disclose their criminal activities to anyone. Further, it is grounded on their assertion of the right to make Chemical a "silent partner" and unwilling participant in their crimes. This is not only outrageous, it also fails to state a claim for which any relief may be awarded against Chemical.

After the federal action was dismissed, petitioner, Sybil Young ("Sybil"), again sued Chemical in New York State Court for the very same financial disclosures alleging violations of her so-called common law privacy and confidentiality rights. Assuming that she has a legally cognizable claim, she may be afforded full relief for any alleged grievance in her State Court action. Intervention by this Court is neither necessary nor appropriate.

Counter Statement of Facts

In 1981, Sybil opened a checking account at Chemical in New York. JA 88 ¶ 7.[1] Roderick did not have either an account or fiduciary relationship with Chemical. JA 269 ¶ 2. He is not a representative authorized by Chemical to transact business with the Bank on behalf of Sybil. JA 269 ¶ 2. Sybil never advised Chemical that Roderick was authorized to transact business with Chemical on her behalf, nor did she file with the Bank the necessary power-of-attorney to permit him to act as her authorized representative. JA 269 ¶ 2.

Chemical refused to transact Bank business with Roderick. JA 269 ¶ 3. Sybil admits that Roderick attempted to deposit $35,000 in double endorsed travelers checks to her account on

[1] References to the Petition are noted as "Pet.", to the Petition's Appendix are noted as "A" and to the Joint Appendix are noted as "JA".

August 1, 1986, but that Chemical refused to accept this deposit and returned it. JA 287 ¶ 2. Roderick attempted to circumvent Bank policy by depositing these checks in an overnight deposit drop. Chemical once again refused to accept this transaction and returned these checks the same day to Sybil. JA 269 ¶ 2.

Chemical did not instigate Bermuda's investigation of petitioners, and there is absolutely no evidence in the record that Chemical was the source of a tip to the Bermuda authorities. Petitioners admit Chemical initially refused to cooperate with the Bermuda authorities and insisted that it receive a subpoena before it would disclose any information. Petitioners also expressly stated on the record they are "prepared to admit the assertions of fact contained in paragraph . . . 3 of Denton's Affirmation." JA 96 ¶ 21.[2] At paragraph 3 of Commissioner Denton's Affirmation he states:

> . . . [Attorney General] Froomkin said that he had contacted [Chemical Fraud Prevention Officer] O'Flaherty, who told him that the bank could not respond directly to a request from Bermuda authorities, and that the request would have to be made in a manner that could result in the issuance of a subpoena. Accordingly, Mr. Froomkin asked me if our Office could be of any assistance. See Exhibit C to Sybil Young Affidavit. JA 114-15 ¶ 3.

Petitioners admit that on or about January 30, 1987, the District Court issued a subpoena which required the production of records by Chemical (the "Subpoena"). They affirmatively admit the truth of the statements made by Mr. Denton at paragraph 13 of his Affirmation, JA 100 ¶ 33, where he states:

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[2] The Affidavit of Sybil Young in this action, sworn to February 29, 1988, in support of petitioners' cross motion against Chemical annexed and avowed the correctness of key portions of the Affirmations of Commissioner David Denton, sworn to February 5, 1988, and Douglas Schofield, an official of Bermuda, sworn to January 22, 1988, in support of the United States motion in the action of *Young v. United States Department of Justice*, 87 Civ. 8307 (JFK).

> The Deposition Subpoena was signed by the Hon. Charles E. Steward, Jr. on January 30, 1987. It *required Chemical Bank to produce the Youngs' bank records*. It also ordered . . . that Chemical Bank employees were not to disclose the existence of the subpoena except on further order of the Court. See Exhibit C to Sybil Young's Affidavit. [Emphasis added]. JA 117 ¶ 13.

Sybil further admits that only after receiving Attorney General Froomkin's request for Judicial Assistance in January 1987 did Mr. Denton contact Fraud Prevention Officer O'Flaherty of Chemical, and for the first time describe the documents that the Subpoena covered. JA 97 ¶ 24. Mr. Denton confirms that "as in this case" banks insist on a subpoena before delivering documents. JA 116-17 ¶¶ 9 and 10.

Petitioners do not contravert with personal knowledge that Chemical turned over documents and records only after it received the Subpoena (JA 118 ¶ 14), and Sybil admits that on the same day, February 4, 1987, that the documents were given to Commissioner Denton, he transmitted them to Bermuda. JA 98 ¶ 27.

Sybil states: "the Court had issued its order directing Chemical to delay any notice to me . . . ." JA 94 ¶ 16. In fact, the Court did more than direct Chemical to delay, it expressly prohibited Chemical from making any disclosure pending further order of the Court. JA 94 ¶ 16. Chemical obeyed this Court Order. JA 270 ¶ 6.

Sybil further states: "I am prepared to admit that [Chemical Officer] O'Flaherty informed Mr. Denton that Chemical would ordinarily disclose to a customer the fact that such an information request had been made absent an order of the Court requiring otherwise." JA 97 ¶ 26. Further, Sybil expressly admits:

> *I have no knowledge* whether Roderick or I were ever the subject of an investigation undertaken by the Department for its own purposes or whether any

> record or information relating to my accounts at Chemical, which Mr. Denton or Ms. Schofield obtained from Chemical, was used, or reviewed for potential use, by the Department for or in connection with any investigation by the Department for its own purposes. [Emphasis added].

JA 95 ¶ 18.

Commissioner Denton swore under oath that the information and records requested from Chemical were *not* used in connection with any investigation conducted by the government of the United States. JA 119 ¶ 19. Moreover, to Chemical's knowledge the information produced by it was not used by any United States government agency. JA 274 ¶ 18.

Petitioners confirm the noninvolvement of any federal agency when they assert that in April 1987 witness statements were taken directly by the government of Bermuda without even the attendance of Commissioner Denton, who merely arranged for their production but did not participate in any way in the investigation. JA 95 ¶ 19.

Moreover, Sybil admits:

> With respect to the assertions of fact contained in paragraph 19 of Mr. Denton's declaration, *I have no knowledge, one way or the other whether the Department or any other federal authority has even conducted an investigation of Roderick or me.* . . . I do not have any information, one way or the other, whether any documents contained in Mr. Denton's file have been referred to any federal agency . . . . [Emphasis added].

JA 99-100 ¶ 31. Similarly, she admits:

> With respect to paragraph 20 of Mr. Denton's declaration, *I do not have any information*, one way or the other, *whether any documents or testimony* produced

> in the proceeding referred to in Mr. Denton's declaration, whether pursuant to any order appointing him commissioner or otherwise, *have been used by the Department for any investigation*. [Emphasis added].

JA 100 ¶ 32.

* * *

> . . . I admit that the subpoena was obtained to assist an investigation by the Attorney General of Bermuda into assertedly criminal activities of Roderick and me . . . .

JA 101 ¶ 36.

Since petitioners admit that they have no knowledge that any United States agency conducted any investigation, *a fortiori*, it follows that petitioners set forth no evidence in the record that Chemical produced information and records pursuant to a United States government investigation. In fact, Chemical did not. JA 274 ¶ 18, 275 ¶ 22.

Roderick was arrested in May 1987. Sybil's arrest was delayed, as she initially opposed extradiction from England. In July, Chemical produced additional documents pursuant to the Subpoena. In August, appellants pled guilty to 47 counts of currency violations and of making false sworn statements. Sybil and Roderick Young were sentenced to up to 2 years in prison for each violation, and in the alternative, fines in the amounts of $775,000 and $184,500, respectfully, for their wilful violations of Bermuda's currency laws. JA 36 ¶ 5.

Argument

I

THE DISTRICT AND CIRCUIT COURTS CORRECTLY HELD THAT THE COMPLAINT FAILED TO AVER A CAUSE OF ACTION PURSUANT TO THE RIGHT TO FINANCIAL PRIVACY ACT

a. The Privacy Act Does Not Apply To Information Ordered Disclosed To Commissioners Appointed by the Court Pursuant to the Assistance to Foreign Tribunals and Litigants Act.

The Privacy Act provides no basis for any claim against Chemical. The Court held that Commissioner Denton was not an agent of a government authority within the meaning of the Privacy Act; accordingly, the protections of the Privacy Act were not triggered. A-7, 37. If the government employee is found to be exempt from the Privacy Act "then the disclosing financial institution is also excepted from the [Privacy] Act." *Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365 n. 4 (S.D. Ind. 1989).

Section 3401(3) of the Privacy Act defines "governmental authority" as any agency or department of the United States, or any officer, employee or agent thereof. The Privacy Act does not apply to discovery requests made pursuant to 28 U.S.C. §1782 that originate from foreign governments. The Subpoena served upon Chemical, pursuant to which it disclosed information and account records relating to Sybil Young, was procured pursuant to 28 U.S.C. §1782, which relates to assistance to foreign and international tribunals and litigants. That section states in pertinent part:

> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the

> testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement . . . .

The Circuit Court held that the District Court that issued the Commission and the Subpoena was not a "government authority". A-36. *See Doe v. Board of Professional Responsibility of the District of Columbia Court of Appeals*, 717 F.2d 1424 (D.C. Cir. 1983). The Court of Appeals found that District Judge Stewart appointed Mr. Denton as a Commissioner to act simply as an arm of the Court, and it concluded that since the Court was not a "governmental authority" the Commissioners should be afforded the same treatment which the Court enjoys. A-36.

The Assistant United States Attorney, as the Commissioner appointed by the District Court pursuant to §1782, was merely a "conduit" to compel the production of documents and the taking of testimony to assist the request for information received from the Bermudian government regarding two of its residents. A-33, 34 and A- 5. *See e.g., Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, n.13 (1987) (the commissioner is a conduit for the receipt and transmission of requests.)

The United States Department of Justice did not conduct a law enforcement inquiry into the affairs of the Youngs. A-36, 48 and JA 120 ¶20. The Subpoena was directed against foreign residents in connection with a foreign investigation. The fact that a foreign government may have sought financial disclosures does not trigger the Privacy Act; it is only triggered when there exists a United States law enforcement inquiry. Thus, the disclosure of information falls outside the scope of the Privacy Act. As the Privacy Act does not apply, its protections are not triggered.[3]

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[3] *Cf., Doe v. United States*, 860 F.2d 40 (2d Cir. 1988) (The protections and requirements of the Privacy Act and the Assistance to Foreign Tribunals and Litigants Act are exclusive of each other and are not over-lapping).

The Privacy Act is not a panacea meant to curtail the investigatory freedom of anyone other than the United States. By its express definition of government authority, the Privacy Act is inapplicable to state agencies or foreign governments. Privacy Act §3401. On its face, the Privacy Act does not apply to requests for judicial intervention by foreign tribunals and litigants, which are governed by 28 U.S.C. §1782 and are not federal government agents. Section 1782 was not repealed or otherwise modified by passage of the Privacy Act.

The precise issue under discussion was raised in *In Re Letter of Request for Judicial Assistance From the Tribunal Civil de Port-au- Prince, Republic of Haiti*, 669 F. Supp. 403 (S.D. Fla. 1987) ("*Port-au-Prince*"). In that case, a former Haitian government official moved to vacate an order appointing a commissioner pursuant to 28 U.S.C. §1782 and to quash a subpoena for his bank records in the United States issued by a federal court in connection with a criminal investigation conducted by a Haitian tribunal. The official alleged that the subpoena should be quashed because, *inter alia*, provisions of the Privacy Act had not been satisfied. The court summarily dismissed this argument:

> Nothing in the language or history of the Right to Financial Privacy Act shields Mercoron's [the official's] financial records from discovery requested pursuant to Section 1782. This Court will not extend the reach of the Right to Financial Privacy Act to requests that emanate from a foreign government. *Id.* at 407.

In *Republic of Haiti v. Crown Charters, Inc.*, 667 F. Supp. 839 (S.D. Fla. 1987), the District Court issued a subpoena pursuant to 28 U.S.C. §1782 and appointed the law firm of Stroock, Stroock and Lavan as Commissioner to compel such discovery. The Court in *Crown Charters* made clear that the commissioner acts as a representative of the foreign tribunal and not in its own individual capacity in compelling the production of testimony and documents.

> . . . One of the purposes of 28 U.S.C. §1782 is to permit the extension of assistance to foreign tribunals in

> resolving foreign disputes. *See In Re Letters Rogatory from the Tokyo District*, 539 F.2d 1216, 1218 (9th Cir. 1976). Although the statute vests the commissioner with limited judicial capacity such as the power to administer oaths, the commissioner's primary function is to represent the interests of Haiti in conducting the requested discovery. Thus, the Stroock firm is at all times an advocate for Haitian interests . . . .

667 F. Supp. at 848.

The District Court in *Crown Charters* did not superimpose the requirements of the Privacy Act on this commission. This is appropriate since it involved a foreign tribunal's resolution of a foreign dispute, facts virtually identical to those in this action, where the complaint acknowledges that petitioners are residents of Bermuda who were investigated (and ultimately prosecuted and convicted) by the Government of Bermuda. JA 144-46.

Petitioners cite two decisions in support of their strained view that Privacy Act protections should be superimposed upon §1782 commissions, one of which is an earlier decision from a district court of subordinate jurisdiction to the Second Circuit Court of Appeals and may no longer be good law if it is read as inconsistent with the Circuit Court's ruling in this case. Pet. 13. Petitioners rely exclusively on *In re Request For Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 n.12 (11th Cir. 1988), *cert denied*, 109 S. Ct. 784 (1989), and *In re Request for International and Judicial Assistant (Letter Rogatory) from the Federative Republic of Brazil*, 700 F. Supp. 723, 725-26 (S.D.N.Y. 1988). The Circuit Court easily distinguished the holdings in these cases from the facts present here. It wrote that the footnote from *Trinidad and Tobago* relied on by petitioners, "in dictum, did no more than note that the Commissioner involved would comply with RFPA [Privacy Act]." The Second Circuit Court of Appeals observed that in the second case relied on by petitioners, *Republic of Brazil*, the issue was not central to the controversy before the court. It further noted

that, although the court in *Republic of Brazil* followed the dictum in *Trinidad and Tobago*, it was critical of the Eleventh Circuit's passing footnote reference to the Privacy Act as lacking any analysis. A-12, 13.

Moreover, the holding in *Republic of Brazil*, 687 F. Supp. 880, *stay lifted*, 700 F. Supp. 723 (S.D.N.Y. 1988), is really consistent with the narrow holding in this action. Discussing the disputed letters rogatory the court in *Republic of Brazil* found that District Judge Carter had appointed the United States Attorney, who was the actual prosecutor in the action, also to act as commissioner under the Assistance to Foreign Tribunals and Litigants Act, and this same prosecutor caused a grand jury subpoena to issue to the bank. In deciding the Privacy Act applied to the facts of the case before it, the court already had made quite clear in its prior decision that the United States Attorney had conducted and was continuing to conduct a federal investigation and prosecution of the bank's officers and customers. The court explained that "[t]his case has its genesis in a criminal prosecution in this District against . . . a Morgan officer [who] was convicted . . . ." 687 F. Supp. 880, and that it was "[a]gainst that background, the letters rogatory in dispute were issued." 687 F. Supp. 880.

Consistent with the facts in *Republic of Brazil* the District Court in the present action made the limited holding:

> The United States Attorney's Office has not conducted any independent investigation into the Young's affairs. See Denton Decl. ¶19. Thus, the Court must conclude that the Commissioners here were merely conduits of information and hence not subject to the Privacy Act.

A-48.

The complaint avered that the production of records and the taking of testimony pursuant to the Subpoena was at the request of an investigation conducted by the Bermudian government. JA 29 ¶20. *See also* JA-121-22. The United States Attorney's Office, in its capacity as Commissioner, was a "conduit" of information for the District Court pursuant to 28 U.S.C. §1782. JA 15. It was not conducting any investigation of its own. JA

120 ¶20. Accordingly, no claim for relief under the Privacy Act was stated, and neither the complaint nor the papers submitted in support of petitioner's cross-motion raised a single genuine issue of fact to preclude summary judgment.

The requirement of a "genuine" issue of fact means that the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Both lower courts correctly found that petitioners failed to raise a genuine issue. The language of Rule 56(a) mandated the entry of summary judgment against petitioners since they failed to make a showing sufficient to establish the existence of an element essential to their case and on which they bore the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). For such reason, the rulings of the courts below were correct, and *certiorari* should not be granted.

b. Chemical May Not Be Held Liable For Complying With a Court Order as § 3413(d) of the Privacy Act Exempts It from Liability.

Assuming *arguendo* that the Privacy Act were applicable to the disclosures made here, petitioners, nevertheless, still would fail to set forth a claim for relief. Petitioners admit:

> . . .[Attorney General] Froomkin said that he had contacted [Chemical Fraud Prevention Officer] O'Flaherty, who told him that the bank could not respond directly to a request from Bermuda authorities, and that the request would have to be made in a manner that could result in the issuance of a subpoena. Accordingly, Mr. Froomkin asked [Denton] if [his] Office could be of any assistance.

See JA 96 ¶21 (Sybil Young Aff. ¶21 admitting Denton's Affirmation at ¶3.)

Moreover, petitioners admit:

> The Deposition Subpoena was signed by the Hon. Charles E. Stewart, Jr. on January 30, 1987. *It required Chemical Bank to produce the Youngs' bank*

> *records*. It also ordered . . . that Chemical Bank employees were not to disclose the existence of the subpoena except on further order of the Court. [Emphasis added.]

See JA 100 (Sybil Young Aff. ¶33 admitting Denton's Affirmation at 13.)

The Subpoena contained a nondisclosure provision (a "gag" order), which prohibited Chemical from disclosing both the existence of and the Bank's compliance with the Subpoena. JA 40. Chemical complied with the Court ordered Subpoena, which was the product of judicial scrutiny and, as held by the District Court, was in all respects regular and proper on its face. A-49. Accordingly, even if the Privacy Act applied to the disclosures made in this case (which it does not), petitioners would fail to state a claim for relief. JA 16.

Chemical's production of information pursuant to a § 1782 Order was expressly exempted from the provisions of the Privacy Act. The Court below wrote:

> It is beyond cavil that 28 U.S.C. § 1782 is a federal statute which required that Chemical disclose the requested financial information. As such, the information provided by Chemical was "required to be reported" and thus not subject to the Privacy Act's strictures. A-37.

Petitioners distort the Court's holding by asserting that it found an "implied exemption" in addition to those expressly enumerated in the Privacy Act. In point of fact, no such "implied exemption" was found, and, to the contrary, the Court held that Chemical's conduct was consistent with the provisions of §3413(d) of the Privacy Act.

Section 3413(d) of the Privacy Act provides:

> **Nothing in [the Privacy Act] shall authorize the withholding of financial records or information required to be reported in accordance with any Federal statute or rule promulgated thereunder.**

Relying on the statements of the sponsor of this bill in the House Report, 1978 U.S. Code Cong. & Admin. News 9356, the District Court concluded that the broad provision of §3413(d) was to be liberally construed, and Chemical's conduct squarely fit within an express exception to the Privacy Act. A 37.

The Circuit Court in *Doe v. United States*, 860 F.2d 40 (2d Cir. 1988), decided "by enacting §1782 'Congress has given the district courts broad discretion in granting judicial assistance to foreign countries . . .' *In Re Request for Assistance*, 848 F.2d 1151, 1154 (11th Cir. 1988). The standard of review for determining whether the district court can exercise . . . its §1782 authority is abuse of discretion."

The Court's compulsion of Chemical's production of financial records pursuant to its § 1782 Order falls within an express exemption to the Privacy Act within the meaning of §3413(d).

Once the Federal District Court ordered Chemical to comply, the Bank was faced with the following options:

1. it could comply;

2. it could do nothing and be in contempt of court; or

3. it could move to quash the Subpoena.

Chemical chose the first option. Any other course of conduct was unfathomable to it. Chemical had no desire to be in contempt of a Court order in every way regular on its face, and, which the District Court has the clear power to issue and to enforce. Discussing §1782, the Court in *Doe v. United States*, 860 F.2d 40 (2d Cir. 1988), made very clear: "The district courts 'from the very nature of their institution, possess the power to fine for contempt, imprison for contumacy, enforce the observance of orders, *etc.*' *Ex Parte Terry*, 128 U.S. 289, 302-03 (1888)."

Petitioners incorrectly claim that the Subpoena should not have been issued pursuant to the Circuit Court's holdings of *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980), and *In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d 1017 (2d Cir. 1967). Pet. 27. The

Second Circuit Court of Appeals did not agree and "readily distinguished" those cases from the present one. A-38.[4] Indeed, petitioners' argument begs the question with respect to Chemical's conduct. Once the Subpoena was issued Chemical had no choice but to obey it.

Petitioners explain in detail the "sins" of the United States Attorney in requesting the issuance of the Subpoena, one that purportedly did not state in detail the documents sought, and in failing to issue a certificate of compliance to the Bank in accordance with the Privacy Act. None of this establishes a violation of the Privacy Act *by Chemical*. Denton's failure to issue a Privacy Act certificate is irrelevant to establishing liability on Chemical's part. A certificate of compliance may not be issued prior to notification of the customer; however, when, as in this case, customer notification is delayed by court order, the financial institution may not withhold its performance under that order.

Chemical also had no real ability to stand in the shoes of its customers, and in this case non-customers, like Roderick Young, and absorb the expense, burden and risk of litigation to move to quash the Subpoena on petitioners' behalf. No case has ever held that this burden was a legal obligation of the financial institution. Chemical receives more than 2,500 subpoenas a year. JA 278 ¶31. The manpower, time and expense involved in contesting even a fraction of these would raise exorbitantly the cost of production and even more importantly, would tremendously delay Chemical's ability to respond to legitimate requests, which if not complied with in a timely way may have grave repercussions to the administration of justice. The law does not require Chemical to take on this burden, nor do petitioners direct the Court's attention to a single case that implies as much. For policy reasons, if nothing else, this Court should not disturb the holding of the Circuit Court.

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[4] Following *Trinidad and Tobago*, 648 F. Supp. 464 (S.D. Fla. 1986), *aff'd*, 848 F.2d 1151 (11th Cir. 1988), *cert denied*, 109 S.Ct. 784 (1989), the Court of Appeals determined that the Attorney General of Bermuda was an "interested person" within the meaning of § 1782. A-39.

c. Even Without a Subpoena Chemical Would Have Been Free to Make a Voluntary Disclosure in the Bermuda Investigation.

Section 1782(b) of the Assistance to Foreign Tribunals and Litigants Act specifically permits the type of disclosures, which the petitioners mistakenly aver are actionable.[5] That section states:

> (b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

The legislative history of 28 U.S.C. §1782(b) makes clear that Congress adopted this statute in an effort to improve cooperation in international litigation. *See* 1964 U.S. Code Cong. and Adm. News at pp. 3782-3783. Part of that history is especially illustrative of Congressional intent:

> Subsection (b) of proposed revised section 1782 reaffirms the pre-existing freedom of persons within the United States voluntarily to give testimony or statements or produce tangible evidence in connection with foreign or international proceedings or investigations. This explicit reaffirmation is considered desirable to stress in the relations with foreign countries the large degree of freedom existing in this area

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[5] The Youngs admit they have no evidence but rather merely speculation that Chemical was the source of a tip to Bermuda setting off an investigation by the Bermuda Attorney General into their illegal money laundering activities. (JA 276 ¶¶25 and 26). Chemical refused to disclose any information or to make any bank records available to the Bermuda Attorney General (or for that matter to anyone) without a Court order (JA 114-15 ¶3). Contrary to petitioners assertion, there is no evidence in the record that Chemical officer John O'Flaherty had been communicating with Bermuda Attorney General Froomkin other than to decline to release information without a Court order.

> in the United States. It also serves to make clear that subsection (a) leaves that freedom unaffected. *Id.* at 3790.

See also, Letter from Rep. Oscar Cox, Chairman of Commission on International Rules of Judicial Procedure to John McCormack, Speaker of the House (May 28, 1963), reprinted in 1964 U.S. Code Cong. to Admin. News at 3792-94. *See generally, In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1153 (11th Cir. 1988).

Thus, even without a subpoena Chemical would have been free to make a voluntary disclosure in the Bermuda investigation. Petitioners incorrectly allege that Chemical produced witness statements not covered by the Subpoena to Attorney General Froomkin. Pet. 8-9. Indeed, the witness statements were expressly covered by the Deposition Subpoena served on Chemical. JA-39. *Cf., In re Sumar*, 123 F.R.D. 467 (S.D.N.Y. 1988) (Affidavit or sworn statement may be treated as the same as deposition for purposes of letter rogatory request). The fact that the Government of Bermuda preferred to take Chemical's testimony in the form of witness statements — a form expressly authorized by §1782 — rather than orally is a difference without a distinction. Moreover, Chemical actually gave the witness statements directly to the Bermudian officials, and Commissioner Denton did not participate in taking these statements. JA 272 ¶12. Bermuda's Attorney General, not Chemical, provided the witness statements to Commissioner Denton. JA 136-137.[6]

The Circuit Court believed that there existed a real possibility that foreign governments would turn to private commissions for assistance undermining the government's ability to obtain reciprocal cooperation. JA-11. The Court declined to give the

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[6] The record clearly shows that there were no informal discussions between Attorney General Froomkin's representatives other than those compelled by the Subpoena. Pet. 8. Even if there had been, however, such discussions would not be actionable pursuant to the Privacy Act since it regulates only the production of financial information to the United States federal government.

Privacy Act an interpretation that would frustrate another independent objective of Congress, *i.e.*, cooperation in international investigations. *See Lieberman v. Federal Trade Comm'n*, 771 F.2d 32, 40 (2d Cir. 1985). It wrote:

> . . .Congress has long recognized the freedom of individuals to provide information voluntarily for use in foreign proceedings. *See* 28 U.S.C. § 1782(b). The Act reveals Congress' objective of encouraging voluntary cooperation with law enforcement agencies. For example, Congress specifically exempted "tips" to law enforcement authorities by banks that suspect a customer of engaging in criminal activity. 12 U.S.C. § 3403(e). In fact, it felt so strongly about encouraging voluntary cooperation that it subsequently added a provision preempting any other state or federal law to the contrary. *Id.* § 3403(c) (Supp. 1988). In addition, it declined to adopt certain provisions that would have restricted the ability of government authorities to share information acquired under the Act with other agencies. It did so, in part, out of concern that the provisions would also restrict the ability of law enforcement groups to share evidence of criminal activity with foreign governments. *See Hearings on S. 2096 Before the Subcomm. on Financial Institutions, 95th Cong., 2d Sess.*, 235-36 (1978) (Statement of Hon. Harold M. Williams, Chairman of the Securities and Exchange Commission). A 9-10.

Petitioners can point to no legal authority that prohibits Chemical from providing information relative to crimes involving Sybil's accounts at Chemical to law enforcement officials of a foreign government. The freedom to voluntarily give such testimony or produce documents for use in a proceeding in a foreign or international tribunal, which reflects the federal public policy of this country, was left unaffected by subsequent legislation, including the Privacy Act.[7]

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[7] Although the Privacy Act does not apply to this case, it is interesting to note that even §3403 thereof absolves financial institutions from liability to a

(*Footnote continued*)

d. The Lower Courts Correctly Declined to Render An Advisory Opinion Regarding Potential Abuses Of the Privacy Act Since There Were No Facts Adduced In the Record to Reflect An Actual Abuse by Commissioner Denton.

Petitioners complain that the Circuit Court declined to render an advisory opinion since it "did not address the issue of whether the Act nontheless applies when the Government, although seeking or obtaining customer information from a financial institution for a foreign government, also seeks the information for its own purposes, or reserves the right to review and use the information for its own purposes, or actually uses the information for its own purposes." Pet. 11. Petitioners, however, admit:

> [T]he District Court found to be the facts in these cases, [that] the Department [did] not obtain such documents in furtherance of an investigation of its own. . . .[T]herefore, (as the District Court determined) the Government is acting merely as a "conduit" for the receipt and transmission of information and is not acting in furtherance of an investigation of the United States, the Act does not apply. Pet. 10.

The Circuit Court properly did not render an advisory opinion, nor should *certiorari* be granted by this Court to review issues that are not supported by any facts in the record and that are expressly inconsistent with the findings of the District Court. *See, e.g., Golden v. Zwickler*, 394 U.S. 103 (1969) (Federal courts will not render advisory opinions).

Petitioners admit that §1782 does not require the appointment of a federal official to assist a request for judicial intervention by a foreign litigant. It just so happens, that in this case, the District Court appointed an Assistant United States Attorney as Commissioner. Chemical's obligations in responding to the

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customer under any federal or state law or regulation for notification to a United States governmental authority that the institution has information that may be relevant to a possible violation of any statute or regulation.

Commissioner, who functions merely as a conduit of information, does not become enlarged by the happenstance that the Commissioner is also a federal employee. Surely, if the District Court had ordered otherwise, and Chemical produced the exact same information and records leading ultimately to petitioners' convictions to anyone not employed by the federal government, from a New York State prosecutor to the Attorney General of Bermuda, Chemical would not be involved in the present $10,000,000 lawsuit.

Petitioners argue that a holding exempting requests of a foreign government under §1782 from the requirements of the Privacy Act would invite prosecutorial misconduct. Petitioners do not allege, however, that any abuse occurred in this case. In some circumstances, the Privacy Act does not apply to the federal government's own audits and investigations. *Adams v. Board of Governors*, 855 F.2d 1336 (8th Cir. 1988); *Raikos v. Bloomfield State Bank*, 703 F. Supp. 1365 (S.D. Ind. 1989). If an abuse arose in the future, it would be appropriate then to address it by statutory amendment. No other result, however, is indicated on the present record. Since petitioners did not plead and, indeed, cannot show any abuse in this action, in effect, they are requesting an "advisory opinion" in the absence of any actual abuse. Importantly, the uncontradicted affidavits of Mr. Denton establish that he did not use the Bank's records in any federal investigation.[8] Moreover, petitioners fear that hypothetical abuses by the federal government might arise in the future, in contravention of the public policy of the Privacy Act, is not well founded, since petitioners admit that state law enforcement authorities presently are free to act as commissioner without any of the Privacy Act's strictures, and yet the Privacy Act is not intended to curb these potential, but unrealized "abuses".

In reviewing the legislative history of the Privacy Act the Circuit Court concluded that Congress in attempting to strike a balance between unwarranted governmental intrusion without

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[8] The Commissioner's entire file was reviewed by petitioners in the *Young v. United States* action, and no prosecutorial misconduct was discovered or alleged. JA 194 ¶5.

crippling legitimate criminal investigations, exempted from the Privacy Act grand jury subpoenas after it decided that safeguards already in place would adequately protect against abuse. A-8. *See* 12 U.S.C. § 3413(i); H. Rep. at 35, *reprinted* in Code News at 9307; *id.* at 228, reprinted in Code News at 9358. The Circuit Court wrote:

> [W]e believe Congress intended the [Privacy Act] to regulate the release of customer information from financial institutions in circumstances where adequate controls did not already exist. The subpoena served on Chemical, "so-ordered" by a district court, was not in this category because it was subject to judicial review even before it was served. It thus received the same, if not higher, level of scrutiny given grand jury subpoenas. Construing the Act as not to apply in such circumstances would be consistent with congressional intent. A-9.

Further, the Circuit Court found that the impact on the Youngs' privacy interests would have been the same regardless whether the information had been transmitted to Bermuda by a federal employee or a private commissioner. A-11, 12. If Bermuda had chosen a private commissioner, nothing would have prevented it from sending copies of the account information to the Government on its own initiative, which is precisely what happened here with the witness statements obtained by Attorney General Froomkin. A-11.

Petitioners have done a complete review of the entire file maintained by Commissioner Denton and yet have failed to cite any example of an actual abuse of their financial records by the federal government. Moreover, the Circuit Court expressly found that the risk of abuse is "quite low." A-12. It explained that the Government's opportunity for manipulation is limited by the fact that a representative may apply for a commission only upon the request of a foreign party, and then only when the requesting party can adequately establish that the evidence sought will be used in a foreign tribunal.

The absence of even a single case imposing liability against a financial institution for complying with a Court order under similar circumstances is strong evidence that no cause of action exists, and *certiorari* should not be granted. Nevertheless, petitioners appear to argue that Chemical should be held liable because Commissioner Denton allegedly did not act properly. Unfortunately, petitioners do not supply the Court with any reference in the record to support this claim. Instead, grasping at straws, they point out that Mr. Denton (1) made an *ex parte* application; (2) retained copies of the records which according to Judge Stewart's order were "to be retained by the . . . Department . . . for such use as the Attorney General [of Bermuda] or his designated representatives may deem appropriate" (JA-128); and (3) wrote letters to Bermuda on Departmental letterhead. From these facts, petitioners conclude that Denton had a prosecutorial interest in the documents. Actually, no such conclusion is appropriate. Moreover, it was expressly rejected by both the District and Circuit Courts. A-48 - 49, and A-15. The District Court pointedly wrote:

> As this Court has determined that the Commissioners in this case acted properly . . ., it would be absurd to hold that Chemical disclosed Sybil Young's records in violation of the Privacy Act. A-49.

Commissioner Denton took no part in the actual investigation of the Youngs; the investigation was directly handled by the Office of the Attorney General of Bermuda. Denton did not appear at the interviews of bank personnel pursuant to which bank records were identified and information adduced in connection with Bermuda's investigation into the Youngs' criminal activities. The District Court found and the Second Circuit Court of Appeals expressly agreed that Denton was a mere "conduit" for information to the foreign tribunal. A-7 and A-33.

Petitioners mischaracterize the second decretal paragraph of the Order appointing Mr. Denton a commissioner. That order provided in part:

> that the testimony or other evidence in accordance with this Order are to be retained by the United States Department of Justice for such use as the Attorney General or his designated representatives may deem appropriate.

Petitioners assert that the Court ordered that the United States Department of Justice should retain the evidence adduced through the Commission for such use as the [United States] Attorney General should deem appropriate. Pet. 8. Petitioners' strained reading of this paragraph is completely at odds with its plain meaning and their interpretation was not the one afforded the Order by the Commissioner. The Court actually ordered that the United States Department of Justice should retain the evidence adduced by the Commission for such use as the Attorney General *of Bermuda* or his designated representative may deem appropriate. In both the application and the subsequent order the Attorney General of Bermuda is referred to as the "Attorney General." Nowhere in any Court record concerning the Youngs is the Attorney General of the United States ever mentioned. The Department of Justice consistently is described as the Department and is never referred to as the Attorney General. Copies of the documents were to be retained by the Commissioner for the totally proper circumstance, where for example, the originals might be lost in transit or they had to be reauthenticated by witnesses, *etc.*

Moreover, petitioners do not explain why it is Chemical's responsibility to ensure — much less prevent — Commissioner Denton from retaining copies of Chemical's records in his files or how the Commissioner's retention of a duplicate set of documents could possibly cause a violation of the Privacy Act by Chemical.

Not only is petitioners' claim that the Commissioner acted improperly without foundation, even if it were true, it would not state a cause of action against Chemical or established why *certiorari* should be granted in the *Chemical* action.

II

RODERICK YOUNG LACKS STANDING TO SUE CHEMICAL PURSUANT TO THE PRIVACY ACT BECAUSE HE IS NOT AN AUTHORIZED REPRESENTATIVE OF ANY CHEMICAL ACCOUNT

The District Court (affirmed by the Court of Appeals) correctly held that the second cause of action averring Roderick Young's claim under the Privacy Act also fails to state a cause of action because he is not a customer or authorized representative of any account of Chemical. A 52.

The Privacy Act defines "customer" as "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution . . . in relation to an account maintained in the persons name." Privacy Act §3405. Roderick has no account or relationship with Chemical. A 52. Sybil admits in her affidavit in opposition to Chemical's motion that Chemical did not authorize Roderick to transact banking business with it, and, in fact, rejected his two aborted attempts unauthorizedly to act as Sybil's messenger. JA 89-90. Indeed, she describes Chemical's refusal to accept deposits from Roderick as turning into an "imbroglio." JA 260 ¶6. Chemical never permitted Roderick to act on Sybil's behalf; she filed no authorization or power-of-attorney or any instruction claiming to invest him with this authority, and none exists in any Bank record. A 52.

Roderick is not an "authorized" representative. See for example, the Sectional Analysis and Explanation of the Department of Justice cited below with approval by petitioners, which explains:

> "customer" in turn, is a person who uses a service of an office of a financial institution, or for whom the institution acts as a fiduciary, but only in relation to an account maintained in the person's name. *The definitions of "financial records" and customer", taken together, are intended to preclude application of the bill to anyone other than the person whose account*

> *information the government seeks access*. They would exclude, for example, the endorsers of checks and guarantors of loans. [Emphasis added.]

A-52.

Although Sybil argued to the Court below that Roderick was her agent, in fact, he was not. Carried to its logical conclusion, under such implied agency theory Roderick would have been entitled to write checks on Sybil's account even though he had no signing authority, cancel lines of credit, take out loans obliging Sybil to repay, open letters of credit on her behalf and take any other action which occurred to him with respect to her account at Chemical, all without the necessity that Sybil take the simple expedient of notifying the Bank. Using petitioners' rationale, Sybil would be liable personally for all Roderick's acts because she had a silent, unexpressed and secret intention to make him her representative. Moreover, Chemical would be liable for breach of contract if it refused to follow the instructions of this stranger because Sybil *sub silentio* without notice to Chemical had made him her representative. This is incorrect, and the petitioners offer no authority to support this view.

The Court in *Ridgeley v. Merchants State Bank*, 699 F. Supp. 100 (N.D. Tex. 1988), dismissed plaintiff's claim for failure to state a cause of action because plaintiff, although a "representative" of customers and a signatory on the relevant checking account, was not a "customer" within the meaning of the Privacy Act. The *Ridgely* Court relied on the Supreme Court's ruling in *Securities and Exchange Commission v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745 (1984). The most salient feature of the Privacy Act is the narrow scope of the entitlements it creates. *Id. Ridgeley*. It carefully limits the kinds of customers to whom it applies. *Id. O'Brien*. In the case at bar, Roderick Young was not even an authorized signatory on Sybil's account at Chemical.

Thus, since Roderick Young is not a customer, and Chemical never turned over any information relevant to him, he lacks standing to sue under the Privacy Act. The lower courts correctly held that he failed to state any claim for which relief may be granted, and the complaint properly was dismissed as to him.

CONCLUSION

For the foregoing reasons, Chemical Bank respectfully requests that a *writ of certiorari* not be granted.

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